IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6556

LEON BUSH,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks a writ of certiorari to review an order of the New York Court of Appeals entered December 28, 1973 (33 N.Y. 2d 921) which unanimously affirmed, in a *per curiam* opinion, an order of the Appellate Division, Second Department entered July 5, 1972 which unanimously affirmed a judgment of conviction entered in Supreme Court, Kings County on September 22, 1971 convicting Petitioner of Felony Murder (N.Y. Penal Law Sec. 125.25(3) and Manslaughter in the Second Degree (N.Y. Penal Law Sec. 125.15) and sentencing him to concurrent indeterminate sentences of fifteen years to life imprisonment on the Felony Murder charge and a maximum of fifteen years imprisonment on the Manslaughter charge.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(2). It is suggested that jurisdiction is more properly sought under 28 U.S.C. 1257(3).

Questions Presented

1. Whether this Court's decision in *Wardius* v. *Oregon*, (412 U.S. 470) should be applied retroactively to trials conducted prior to June 11, 1973.
2. Whether the application of New York's non-reciprocal notice-of-alibi statute to Petitioner's pre-*Wardius* trial, wherein none of Petitioner's alibi testimony was precluded and wherein no request for a continuance was made after the State's alibi rebuttal witnesses testified, denied Petitioner a fair trial.

Statute

New York Code of Criminal Procedure:

§ 295-l* Bill of particulars from defendant; when required; contents; failure to furnish

In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter

* Now found in N.Y. Criminal Procedure Law sec. 250.20 (effective Sept. 1, 1971).

serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witness upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall pursuant to such demand, serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days. Added L. 1935, c. 506, eff. July 1, 1935.

Statement of Facts

Petitioner was tried and convicted for killing one Robert Wheeler during the course and furtherance of a robbery in Brooklyn, New York on August 30, 1969. He was arrested in Brooklyn on February 17, 1970 and taken to Brooklyn's 78th detective squad for questioning. After being advised of and waiving the fourfold Miranda rights*, Petitioner related the events leading up to his stabbing of the deceased. He related that he did not find any money on Wheeler's person, but that he did remove the deceased's

* The voluntariness of the statement was litigated at pre-trial hearings and ruled admissably as evidence in chief at trial. This ruling was attacked by Petitioner but upheld by the appellate courts. Petitioner's claim that the confession was the result of physical abuse was rejected by the hearing court and upheld on appeal.

watch. Apparently of little value, the timepiece was sold to an unknown "Spanish man" for $5.00. Petitioner then secreted the murder weapon in a vacant Brooklyn apartment.

At the trial in chief the State's proof basically consisted of the proof that Wheeler died of homicidal means, and that Petitioner confessed to the commission of the crimes charged in the indictment.

The defendant resorted to an alibi defense. The testimony in support of the defense was supplied by the reading of interrogatories conducted in New Orleans, Louisiana, under the auspices of a Commissioner. These statements of friends and relatives placed Petitioner in New Orleans on August 30, 1969.

Petitioner testified at trial in his own behalf. He claimed being in Brooklyn only until August 27, 1969. He acknowledged the confession attributed to him but claimed it was the product of police assaults. Bush admitted signing his name to the confession, but denied that he signed it of his own accord. He was told the content and specific words to use in the confession.

The claim that the confession was beaten from Petitioner was rebutted by police department personnel and employees of the prosecutor's office. The claim of alibi was countered when three lay witnesses testified they saw Petitioner in Brooklyn throughout August and September 1969—the period in which Petitioner asserted he resided in New Orleans.*

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* It is important to note that Petitioner's Counsel did not apply for a continuance prior to commencing cross-examination. The State's alibi rebuttal witnesses were vigorously cross-examined.

Following the closing statements of opposing counsel and the Court's charge on the law the jury returned guilty verdicts on Manslaughter in the Second Degree and Felony Murder.

ARGUMENT

POINT I

The application of New York's "Notice of Alibi" statute did not deny petitioner a fair trial.

On June 11, 1973 this Court ruled in *Wardius* v. *Oregon* (412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed.2d 82) that notice of alibi statutes are constitutionally unfair when they permit the prosecutor to discover the names of potential defense alibi witnesses but deny the defendant reciprocal discovery rights. To the extent that *Oregon's* alibi statute was applied and culminated in an order precluding the offering of defense alibi testimony a new trial was required.

The holding in *Wardius* made clear that notice of alibi statutes must allow for reciprocal discovery in order to pass constitutional muster. The New York Court of Appeals applied the *Wardius* ruling and in the context of a *per curiam* decision declined to order a new trial. Under the facts of this case the New York Appellate Court concluded that a new trial was not required.

It is important to note that the trial judge in *Wardius* prevented a criminal defendant from inntroducing any evidence to support his alibi defense as a sanction for failing to comply with Oregon's notice-of-alibi statute. With key witnesses barred from testifying for the defense pursuant to the trial court's entry of an order of preclusion, due

process was denied (*Wardius* v. *Oregon*, 93 S. Ct. at P. 2211, 37 L.Ed. 2d at P. 86).

It is the fact that although the New York statute contains the reciprocal defect, that Appellant Bush was not barred from utilizing any witnesses or introducing any extrainsic exculpatory proof. Moreover, trial counsel Roseman was given and utilized all the resources of his trade in cross-examining the People's alibi-rebuttal witnesses. Most importantly, Roseman did not feel it necessary to move for a recess or continuance in order to conduct cross-examination. Had Bush moved for additional time on the representation of surprise, he would undoubtedly been entitled to a reasonable time to prepare. Absent such a request on the record and in view of the spirited nature of cross-examination, it is abundantly clear that Bush was not in fact hampered by the unannounced appearance of alibi-rebuttal testimony. Coming as it did from community people personally known to Bush, it should not be surprising that a continuance available for the asking from a trial judge of the highest repute, was unnecessary.

We do not quarrel with those who successfully alleged that non-reciprocal statutes are constitutionally impermissible. But tied to the *Wardius* decision was a long pattern of Oregon criminal procedure practice which made grave demands upon the accused but did little to elevate criminal litigation above a "poker game" strategem. Indeed, Justice Marshall took pains in footnotes 6 and 7 of his opinion (*Wardius* v. *Oregon*, *supra*, 93 S. Ct. at 2212, 37 L.Ed. 2d at 87) to indicate how one-sided, in favor of the state, criminal discovery was in Oregon. Such one-sidedness was simply not Mr. Bush's fate.

On the contrary, Bush was accorded a preliminary hearing in the Criminal Court of the City of New York, Kings County (Furey, *J.*) on March 6, 1970, where he was accorded a full examination of the People's case[1] via the cross-examination of Detective McCarthy. In addition, he utilized an omnibus motion (dated July 6, 1970) which was granted in part in an order by Justice Dominic S. Rinaldi (dated July 20, 1970). In a Bill of Particulars (dated August 7, 1970), Bush was apprised of the time, date, and place of occurrence, and that one Edward Richardson was believed to have aided in the commission of the homicide. The prosecution was directed to provide sweeping discovery. Specifically, Bush's counsel was granted the right to inspect, copy of photograph Bush's Grand Jury testimony, a statement given by Bush to an Assistant District Attorney, prior to indictment, Bush's handwritten confession, all photographs in the possession of the police and the prosecutor as well as the medical examiner's report. It thus becomes apparent that the over-reaching, apparent in *Wardius* v. *Oregon* is simply not present in *People* v. *Bush*.

A second basis for the Court of Appeals' decision was its determination not to apply it to trials conducted prior to June 11, 1973—the decision date of *Wardius*. The New York appellate court held that *Wardius*' application to the facts in *People* v. *Bush* touched merely upon procedural fairness to Petitioner and did not go to the very integrity of the fact finding process. Absent a showing that the failure to predict and apply the teaching of *Wardius* to the fact finding process violated constitutional mandate calling

[1] The value of the preliminary hearing as a discovery tool for the accused was acknowledged in *Coleman* v. *Alabama*, 399 U.S. 1, 9, 90 S. Ct. 1999, 2003, 26 L. Ed. 2d 387 (1970).

the verdict into question, the determination not to extend *Wardius* v. *Oregon*, *supra*, retroactively is a state determination which should be respected and upheld.

Though *Wardius* sounds a clarion call for greater discovery and inspection during the process of criminal litigation, it should be strictly construed. In applying the dictates of *Wardius* to the present controversy, inquiry should focus on whether harm has resulted from non-reciprocal alibi discovery which arises to constitutional dimensions. Where prejudice is absent, *Wardius* is distinguishable and further appeals become constitutionally unnecessary.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Dated: Brooklyn, New York
June, 1974

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